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March 30, 2021

Via ECF

Hon. Andrew L. Carter Jr.
United States District Court
Southern District of New York
40 Foley Square
New York, NY 10007

Re: 429-441 86th Street LLC v. Town Sports International Holdings, Inc.
S.D.N.Y. Case No. 21-cv-01356-ALC

Dear Judge Carter:

Plaintiff 429-441 86th Street, LLC (“Plaintiff”), through their undersigned counsel, Wachtel Missry LLP, and Defendant Town Sports International Holdings, Inc. (“Defendant”), through their undersigned counsel, Akerman LLP, respectfully submit this joint letter to provide a status report and proposed briefing schedule in accordance with the Court’s order of March 15, 2021.

Background

By Notice of Motion dated January 11, 2021, Plaintiff filed a motion for summary judgment in lieu of complaint in New York County Supreme Court. (*See* ECF Doc. 7 [Notice of Removal], ¶ 22). By Notice of Removal dated February 16, 2021, Defendant removed the instant action to federal court (ECF Doc. 7). On March 15, 2021, the Court declined to require Plaintiff to file a complaint and ordered Defendant to file an answer by March 23, 2021 (ECF Doc. 14). The Court further ordered the parties to file a status report with a proposed schedule for the briefing of Plaintiff’s motion for summary judgment, and any other contemplated motions, by March 30, 2021 (*id.*). On March 23, 2021, Defendant filed an answer with counterclaims (ECF Doc. 15). The parties subsequently conferred but were unable to agree on a briefing schedule.

The Parties’ Disputes

Order of Motions. Plaintiff intends to file a motion to dismiss Defendant’s counterclaims.

Plaintiff contends that any briefing regarding Defendant’s counterclaims interposed on March 23, 2021, including Plaintiff’s intended motion to dismiss, should follow the briefing on Plaintiff’s summary judgment motion pending since January 11, 2021.

Defendant submits that if a motion to dismiss is filed, briefing on any motion for summary judgment should be suspended until the motion to dismiss is decided. The normal

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course is for motions related to the pleadings to be decided before any dispositive motions relying on evidence outside of the pleadings are decided.

Rule 56.1 Statement. Defendant has requested that Plaintiff file a Statement of Material Fact pursuant to S.D.N.Y. Local Rule 56.1.

Plaintiff believes that it is appropriate for the Court to convert the Affidavit of Jeff Sutton in Support of Motion for Summary Judgment in lieu of Complaint, sworn to January 11, 2021 (ECF Doc. 7-4), into Plaintiff's Rule 56.1 statement. *See UMB Bank, N.A. v. Bluestone Coke, LLC*, No. 20-CV-2043 (LJL), 2020 WL 6712307, at *2 (S.D.N.Y. Nov. 16, 2020) (allowing plaintiff to elect whether to treat the affidavit filed in support of its motion for summary judgment in lieu of complaint as its Rule 56.1 statement).

It is Defendant's position that the federal rules and this Court's rules govern any procedures with respect to motions for summary judgment, *Valley Nat. Bank v. Oxygen Unlimited, LLC*, No. 10 CIV. 5815 GBD, 2010 WL 5422508, at *2 (S.D.N.Y. Dec. 23, 2010), which require the submission of a statement pursuant to Local Rule 56.1(a) with citations to evidence. The Local Rules require such a statement so that Defendant can respond in kind, citing evidence, as to which facts are in dispute as set forth in Local Rule 56.1(b). Plaintiff has not provided a proposal as to how long it needs to file a statement pursuant to Local Rule 56.1, however, Defendant proposes a deadline of 21 days for Plaintiff to file its statement pursuant to Local Rule 56.1(a). Defendant's position is that *Bluestone* is inapposite, and in *Bluestone*, the movant actually filed a Rule 56.1 statement of material facts. *Id.* ("UMB Bank filed its Rule 56.1 statement along with the affidavit of Gordon Gendler[.]"). Defendant further submits that the weight of authority favors a filing of a Local Rule 56.1 Statement of Facts. *E.g., Torin Assocs., Inc. v. Perez*, No. 15 CIV. 8043 (NSR), 2016 WL 6662271, at *1 (S.D.N.Y. Nov. 10, 2016) (plaintiff required to submit statement pursuant to Local Rule 56.1), ECF 4-5 (Dec. 16, 2015); *Tabatznik v. Turner*, No. 14 CIV. 8135 (JFK), 2016 WL 1267792, at *4 n.2 (S.D.N.Y. Mar. 30, 2016) (plaintiff submitted Local Rule 56.1 statement), ECF 18-22.

Discovery. Defendant seeks leave to take discovery before its response to the motion for summary judgment is due.

Plaintiff's position is that no discovery is needed to decide its pending motion for summary judgment. Under Fed. R. Civ. P. 56(d), a party served with a motion for summary judgment may show, by affidavit or declaration, specific reasons why it is unable, without discovery, to present facts necessary to oppose summary judgment and request appropriate relief. Plaintiff has furthermore specifically allocated time in its proposed briefing schedule (below) for the parties to brief any related cross-motion for discovery Defendant may wish to bring.

Defendant's position is that the proper course is to first decide any motion related to the sufficiency of the pleadings, i.e., a motion to dismiss, before dealing with any motion involving disputes of fact or those that require the submission of any evidence such as a motion for summary judgment. While the briefing on the motion to dismiss is ongoing, the parties should

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exchange initial disclosures pursuant to Rule 26(a) and be permitted to propound written discovery pursuant to Rule 26, if any. Defendant's proposed schedule is below.

Plaintiff's Proposed Schedule

- (i) If the Court so requires, Plaintiff shall file a Rule 56.1 statement on or before April 9, 2021;
- (ii) Defendant's opposition to Plaintiff's pending motion for summary judgment, and any cross-motion for discovery shall be filed on or before April 30, 2021;
- (iii) Plaintiff's reply in further support of summary judgment and any opposition to Defendant's cross-motion shall be filed on or before May 14, 2021;
- (iv) Defendant's reply in further support of its cross-motion for discovery shall be filed on or before May 28, 2021;
- (v) Plaintiff's motion to dismiss Defendant's counterclaims shall be filed on or before June 4, 2021;
- (vi) Defendant's opposition to Plaintiff's motion to dismiss shall be filed on or before June 25, 2021; and
- (vii) Plaintiff's reply in further support of its motion to dismiss shall be filed on or before July 9, 2021.

Defendant's Proposed Schedule

- (i) Plaintiff's motion to dismiss shall be filed on or before April 30, 2021;
- (ii) Defendant's opposition to the motion to dismiss shall be filed on or before May 21, 2021, and the parties shall exchange initial disclosures pursuant to Rule 26(a) on or before May 21, 2021. Additionally, parties may begin on this date, May 21, 2021, to serve written discovery;
- (iii) Plaintiff's reply to the motion to dismiss shall be filed on or before June 4, 2021.
- (iv) The Court will hold a status conference after the decision on the motion to dismiss to determine whether briefing should go forward on the motion for summary judgment.
- (v) If the Court believes briefing on the motion for summary judgment is warranted, Plaintiff shall have 21 days to file a statement of facts pursuant to Local Rule 56.1. Defendant shall file a response to the motion for summary judgment within 45 days after Plaintiff files its Local Rule 56.1 statement of facts, and Plaintiff will file a reply, if any, within 14 days after Defendant files its response to the motion for summary judgment and Local Rule 56.1 statement of facts.

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Respectfully submitted,

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